

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP947-CR
2015AP948-CR
2015AP949-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2006CF2426
2008CF2484
2009CF1389**

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL JAMES NICHOLS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Rock County: MICHAEL R. FITZPATRICK, Judge. *Affirmed.*

Before Higginbotham, Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael Nichols was charged with felony possession of a narcotic, heroin, stemming from a search of a motor vehicle in which Nichols was a passenger. He was also charged in two separate cases with

felony bail jumping and failure to report to jail. The three cases were consolidated in the circuit court for plea and sentencing purposes and were also consolidated on appeal.¹ Nichols entered guilty pleas to the felony possession of heroin charge in 2007, and guilty pleas to felony bail jumping and failure to report to jail at a separate hearing in 2012. Nichols seeks to withdraw his guilty plea only to the felony possession of heroin charge for a “fair and just reason” because his initial defense counsel, Joshua Klaff, provided ineffective assistance of counsel in failing to file a motion to suppress evidence, specifically the heroin. He also seeks resentencing on the felony bail jumping charge and the failure to report to jail charge by a different court and with a different prosecutor because his due process rights were violated at the sentencing hearing.

¶2 For the reasons that follow, we conclude that Nichols has not demonstrated that the circuit court erroneously exercised its discretion in denying Nichols’ postconviction motion to withdraw his guilty plea to the heroin charge nor has he demonstrated a right to resentencing on the felony bail jumping and failure to report charges. We affirm.

BACKGROUND

¶3 The following facts are taken from the record and the transcript of the circuit court’s oral decision rendered on April 13, 2015. As background, in its oral decision, the court noted that the parties agreed that the information in the

¹ At the request of sentencing defense counsel David Saperstein and the prosecutor, the circuit court consolidated these cases for sentencing purposes. These cases remain consolidated on appeal.

police reports marked as Exhibit 4 is true and correct and relied on those statements in rendering its decision.

¶4 On the night of August 9, 2006, City of Janesville police officers stopped a motor vehicle driven by Drew Larson for suspicion of trafficking illegal drugs, specifically heroin. The stop was based on surveillance and intelligence collected by Janesville law enforcement that Larson had purchased heroin in Beloit and returned to Janesville to sell the illegal narcotic. After the stop, Nichols was identified as the passenger in the motor vehicle and was asked to exit the vehicle to enable the police to search the vehicle.

¶5 When Nichols exited the motor vehicle, Janesville police officer O'Leary observed a silver-colored cigarette box in Nichols' hand. Officer O'Leary also observed Nichols' hands and legs were shaking badly as Nichols exited the vehicle. After Nichols exited the car, Officer O'Leary told Nichols to place the cigarette box back into the vehicle, but Nichols tried to put the box in one of his pants pockets. Officer O'Leary again told Nichols to place the cigarette box on the seat, but rather than place it on the seat, Nichols leaned into the vehicle and tried to tuck the cigarette box between two seats. The court found that all of Nichols' activities were in the officers' plain view.

¶6 Officer O'Leary and Janesville police officers Bahr and Naber searched the vehicle based on intelligence the officers received about Larson. During the search, the officers found the silver-colored cigarette box, opened it, and saw a small bundle of a tannish powder tied in a small plastic sandwich baggie corner, which Officer O'Leary believed to be heroin. It was at that point that Nichols was told that he was being placed under arrest for possession of heroin.

¶7 Nichols was charged with one count of felony possession of a narcotic drug, heroin. On June 18, 2007, Nichols pled guilty to the heroin possession charge pursuant to a plea agreement. According to the terms of the plea agreement, Nichols agreed to enter a guilty plea to the charge of heroin possession, and the circuit court would accept Nichols' plea, withhold entry of judgment, and divert Nichols to drug court. As a condition of participating in drug court, Nichols was required to enter into a drug court contract. In keeping with the terms of the plea agreement, the circuit court accepted Nichols' guilty plea, withheld entry of judgment, and referred Nichols to drug court. In January 2008, Nichols was terminated from the drug court for reasons not relevant to the issues in this case.

¶8 In July 2008, Nichols was charged in a separate case with one count of misdemeanor possession of cocaine, one count of misdemeanor drug paraphernalia, and one count of felony bail jumping. The charges stemmed from the discovery of the cocaine and drug paraphernalia by Rock County sheriff's deputies while the deputies were evicting Nichols from his residence.

¶9 On April 9, 2009, Nichols was ordered to report to the Rock County jail for two prior OWI charges to serve ninety days. Nichols failed to report to the jail on that day.

¶10 On the heroin charge, Nichols was ordered to appear in circuit court for sentencing on June 9, 2009. However, Nichols failed to appear as ordered by the court.

¶11 In February 2012, Nichols was arrested on warrants related to his failure to appear in circuit court for sentencing in the heroin case, for failing to

report to jail on the OWI convictions, and a charge of felony bail jumping. In a letter sent to the court by Nichols' newly appointed defense counsel, David Saperstein, counsel informed the court that he and the prosecutor agreed that the three cases be consolidated for sentencing purposes. Prior to the sentencing hearing on the consolidated charges, an original and amended presentence report (PSI) was submitted to the court, which focused primarily on the heroin charge, and Nichols submitted through his attorney a letter and sentencing memorandum.

¶12 Pursuant to a plea agreement, Nichols pled guilty to one count of felony bail jumping and to one count of failure to report to jail; and, as indicated, Nichols had previously pled guilty to the separate possession of heroin charge in 2008. In addition, other charges were dismissed and read-in for sentencing purposes. On the possession of heroin charge, the court sentenced Nichols to serve one and one-half years in initial confinement and one year of extended supervision; one and one-half years of initial confinement and one and one-half years of extended supervision on the felony bail jumping charge, to be served consecutive to 2006CF2426; and two years of initial confinement and one and one-half years of extended supervision on the failure to report to jail charge, to be served consecutively to the two other cases.

¶13 Nichols filed a postconviction motion alleging that he is entitled to withdraw his guilty plea to the possession of heroin charge on two grounds: (1) there was no probable cause under *Terry v. Ohio*² to arrest or search Nichols prior to the discovery of the heroin in the cigarette box, and to search the contents of the cigarette box that Officer O'Leary had ordered Nichols to place in the motor

² *Terry v. Ohio*, 392 U.S. 1 (1968).

vehicle; and (2) because defense counsel Klaff failed to provide effective assistance by failing to file a motion to suppress the heroin, or advise Nichols of the option to move to suppress. He also alleged that he is entitled to resentencing before a different court and with a different prosecutor on all charges as a matter of due process on the ground that “the prosecutor and the Court used information regarding Nichols’ involvement and alleged failures in the Drug Court in violation of the Drug Court contract, when determining the appropriate sentences” on the felony bail jumping and failure to report to jail charges.³

¶14 In an oral ruling, the circuit court denied Nichols postconviction motions for reasons to be explained later. Nichols appeals.

DISCUSSION

¶15 As indicated, Nichols presents two primary arguments on appeal: (1) that he is entitled to withdraw his plea to and the dismissal of the heroin charge because the circuit court erred in denying Nichols motion for postconviction relief based on defense counsel Klaff’s failure to provide effective assistance, and (2) that he is entitled to resentencing as a matter of due process on all of the charges by a different court and with a different prosecutor. We begin our analysis with Nichols’ claim that he is entitled to withdraw his guilty plea to the heroin charge.

³ Nichols also alleged that his attorney at sentencing, David Saperstein, failed to provide effective assistance because Saperstein “neither reviewed the Drug Court contract nor advised Nichols that it could be used to achieve Nichols’ goal of recusing the judge here, who Nichols viewed as biased,” and that Saperstein’s deficient performance prejudiced Nichols. We need not reach this argument because our conclusion that Nichols has not established that the prosecutor and the circuit court relied on statements Nichols made to treatment providers or to the drug court in sentencing Nichols is dispositive.

A. Defense counsel Klaff provided effective assistance to Nichols

¶16 In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice, such as ineffective assistance of counsel. *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *State v. Krieger*, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

¶17 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation was deficient and that the deficiency prejudiced him. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6.

¶18 Nichols rests his plea withdrawal claim on the grounds that the search and seizure of the heroin ultimately found in Larson's vehicle lacked probable cause, and that defense counsel Klaff provided ineffective assistance by failing to identify the unconstitutionality of the search and seizure of the heroin and of Nichols' ultimate arrest, and for failing to advise Nichols of the option of filing a motion to suppress the heroin. We reject Nichols' arguments.

¶19 The circuit court ruled that the search was constitutional and separately ruled that Klaff's failure to advise Nichols regarding the motion to

suppress was a reasonable defense strategy. We need not decide whether a motion to suppress the heroin would have been successful because we agree with the court's ruling that Klaff's failure to advise Nichols regarding the motion to suppress was based on reasonable strategic reasons.

¶20 The circuit court found credible Klaff's testimony that he spent over two hours researching the viability of a motion to suppress the heroin. The court accepted Klaff's testimony that, based on his research, he was not convinced that a motion would succeed, and he decided not to pursue that strategic avenue for that reason. It is the circuit court's responsibility to make determinations of credibility, and we will not overturn those determinations unless there is unequivocal evidence that no finder of fact could believe a witness's testimony. *State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995); *Fidelity & Deposit Co. of Md. v. First Nat'l Bank of Kenosha*, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980).

¶21 Nichols relies on *Terry v. Ohio* in arguing that the search and seizure fell outside the permissible scope of a stop and frisk, and therefore, was unconstitutional. *Terry* is inapt. Neither the circuit court nor the State on appeal treat this case as a stop-and-frisk case, and therefore, subject to the limitations to search and seizure expressed in *Terry*. Nichols did not seriously challenge the justification for the stop of Larson's vehicle. In addition, it is undisputed that the heroin was discovered while searching Larson's vehicle and not by searching Nichols' person. In any event, Officer O'Leary observed the cigarette box in Nichols' hand when Nichols exited the vehicle and based on the totality of the circumstances—intelligence that Larson was returning from Beloit to sell heroin in Janesville, that Nichols was a passenger in Larson's vehicle, and thus, a

reasonably objective police officer would have reason to believe that Nichols might possess illegal drugs—a reasonable argument could have been made under the governing case law in effect at the time of Nichols’ search that the search of the cigarette box was constitutional. However, as we stated, we do not decide the constitutionality of the search.

¶22 The reason we hesitate to decide the suppression issue on its merits is because the case law in effect at the time of the stop in 2006 was unclear as to whether this search would have been constitutional. At the time of the stop, the leading Wisconsin case on this topic was *State v. Pallone*, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. The issue in *Pallone* was “whether police may conduct a warrantless search of the belongings in a motor vehicle when the driver of this vehicle is under arrest but police do not have probable cause to arrest or detain the passenger.” *Pallone*, 236 Wis. 2d 162, ¶3. The basic, pertinent facts in *Pallone* are as follows. Pallone was a passenger in a motor vehicle driven by a person who a police officer observed exit the vehicle while drinking a bottle of beer. *Id.*, ¶5. The driver was arrested for violating the local ordinance concerning open intoxicants in public. *Id.*, ¶7. Pallone exited the vehicle the same time as the driver, leaving a duffle bag in the vehicle. *Id.*, ¶¶8, 10. As pertinent here, one of the officers observed that Pallone was nervous, and stopped Pallone from attempting to remove the duffle bag from the vehicle based on the officer’s concern that the bag might contain weapons or open containers. *Id.*, ¶10. The vehicle was searched, as was the duffel bag, during which an officer found what appeared to be illegal narcotics in the bag. *Id.*, ¶¶11-15. Pallone was arrested. *Id.*, ¶15. The court in *Pallone* held that the warrantless search of the vehicle, including the duffel bag, was constitutionally permissible for the purpose of

preserving evidence of the crime for which the driver was arrested and for the purpose of officer safety. *Id.*, ¶¶51-57.

¶23 What makes the issue in this case a close call is that the *Pallone* court concluded that an officer may search passenger property, but, in *Pallone*, the passenger property was *inside* the vehicle. *Id.*, ¶¶55, 56. Here, the first time that Officer O’Leary observed the cigarette box was when Nichols exited the vehicle, that is, when the cigarette box was *outside* of the vehicle. Comparing the facts in *Pallone* with the facts of this case, it was reasonable for Klaff to question whether a motion to suppress would succeed.

¶24 Nichols cites to and discusses cases from the United States Supreme Court and the Wisconsin Supreme Court that were not issued until years after Nichols was arrested in this case. *See Arizona v. Gant*, 556 U.S. 332 (2009); *Dearborn*, 327 Wis. 2d 252; *State v. Denk*, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775. Nichols appears to concede that none of these cases applies to this case, and we see no reason to include these cases in our analysis here.

¶25 In his main brief on appeal, Nichols points to a 1948 United States Supreme Court decision in *United States v. Di Re*, 332 U.S. 581 (1948), for the stated rule that a person “by mere presence in a suspected car” does not lose his or her “immunities from search of his [or her] person to which he [or she] would otherwise be entitled.” *Id.* at 587. Based on this holding, Nichols argues that the scope of the search was impermissible because he had the cigarette box on his person when he was told by the deputy to put the box back into the vehicle. There are two problems with Nichols’ reliance on *Di Re*.

¶26 First, Nichols does not cite any authority that clarifies that searching an item in plain view, as in this case, in contrast to having an item in a person's pocket, constitutes a search being of his person, as the *Di Re* court intended that phrase to mean. *Id.*

¶27 Second, Nichols does not establish that the holding in *Di Re* as quoted above applies to the facts of this case. The facts in *Di Re* are distinguishable from this case. In *Di Re*, the counterfeited gasoline ration cards (this was post World War II) were not in plain view when the passenger was searched and the passenger was not directed to place the ration cards back into the searched vehicle, as in this case. *Id.* at 583. As we explained, it was not clear under *Pallone* that the unique facts of this case constituted an unconstitutional search of the passenger compartment of Larson's vehicle and the cigarette box found in the vehicle.

¶28 The circuit court relied on additional reasons for concluding that Klaff's strategic decision not to file a motion to suppress was reasonable. The court noted that, early on in the case, Klaff and the prosecutor discussed two possible plea agreements. One proposal was that Nichols would plead guilty to one count of possession of a narcotic, the court would find him guilty but withhold entering judgment, refer Nichols to drug court, and if Nichols successfully completed drug court, the possession of heroin charge would be reduced to a misdemeanor. The second proposal was that Nichols would enter a plea of guilty to the possession of heroin charge. In exchange, the State would recommend that the court accept Nichols' plea, impose and stay a sentence, place Nichols on probation, and impose a jail sentence of six months as a condition of probation. The court pointed to Klaff's testimony that, based on his discussions with the

prosecutor, the prosecutor would withdraw these plea agreement proposals if Klaff filed a motion to suppress. The court was persuaded by Klaff's testimony that his belief was also based on his extensive experience in negotiating plea agreements with the prosecutors in the Rock County district attorney's office. The court credited Klaff's testimony, and concluded that Klaff reasonably believed that had he filed a motion to suppress during these negotiations, the prosecutor would take the drug court and probation proposals off the table.

¶29 The circuit court's final reason for concluding that Klaff's strategy not to file a motion to suppress was reasonable was based on counsel's conduct after Nichols was terminated from drug court. The court pointed to Klaff's testimony that, after Nichols was terminated from the drug court but before the court entered judgment on the one count of heroin possession, Nichols told Klaff that he had two key goals that he wanted to achieve in this case, which was to return to drug court and to stay out of jail. The court pointed out that Klaff managed to delay any action by the court following Nichols' termination from the drug court for over six months, which the court observed achieved the second objective of keeping Nichols out of jail. The court also noted that counsel was able to stall the entry of a judgment of conviction on the heroin charge based on Nichols' earlier guilty plea. Significant to the court, Klaff testified that if the motion to suppress was filed during this six-plus-months' delay between the time Nichols was terminated from drug court in January 2009, and June 2009, when Nichols failed to appear in court on the heroin charge, there was absolutely no chance that the prosecutor would consider the drug court or probation and jail time proposals.

¶30 Based on the above evidence, the circuit court found that Nichols did not suffer any prejudice⁴ by Klaff's failure to file a motion to suppress, and took the extra step of determining that filing the motion probably would have made matters worse. The court denied Nichols' motion to withdraw his plea and specifically found that Nichols did not have a fair and just reason to withdraw the plea.

¶31 We conclude that the circuit court's determination that Klaff's reasons for not pursuing a motion to suppress were based on reasonable strategy is supported by the record. There is a strong presumption that a defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See State v. Domke*, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Domke*, 337 Wis. 2d 268, ¶36 (quoting another source). We are satisfied that Klaff's strategic decisions were reasonable in light of the uncertain success of a motion to suppress the heroin and Klaff's reasonable belief that the prosecutor would withdraw the two proposed plea agreements had Klaff filed a motion to suppress.

⁴ We understand that the circuit court also was inferring that defense counsel Klaff's performance was not deficient.

B. Neither the prosecutor nor the circuit court relied on an improper factor

¶32 Nichols next contends that he is entitled to resentencing on the two charges as a matter of due process before a different court and with a different prosecutor. Nichols points out that, under the terms of the drug court contract, statements that Nichols made in drug court or to treatment providers may not be used “for any other purpose including use in any other criminal proceeding[s],” and that his treatment records were confidential. Nichols claims that he is entitled to resentencing because the prosecutor and the circuit court obtained confidential information regarding Nichols’ drug treatment while in drug court and relied on this information at the sentencing hearing. We reject this argument.

¶33 The provisions of the drug court contract that Nichols claims the prosecutor and the circuit court violated are as follows:

7. That information relevant to my progress and participation in treatment [may] be discussed in open court and that statements I make in court or to treatment providers are for treatment *and not for any other purpose including use in any other criminal proceedings or investigation in which I am either a potential witness or suspect*, and that in all other respects my treatment records will be kept confidential.

8. That if I am terminated from Drug Court, such records or statements may, however, be used at sentencing *on this case*.

....

10. That after completion of this contract, successfully or unsuccessfully, the Court will seal the above treatment reports.

11. That the waiver of confidentiality of my treatment records is limited to the length of this contract.

¶34 As for the prosecutor, she argued at great length, periodically referring to Nichols' treatment and failures in drug court, that the circuit court should disregard Nichols' recommendation that the court impose probation. Undoubtedly, some of the information she conveyed to the court came from her experience as the drug court prosecutor in Nichols' heroin case. Nichols does not explain why the prosecutor's knowledge of Nichols' drug court experience gained as the drug court prosecutor violates his due process rights. In addition, other information regarding Nichols' drug court experiences was provided in the amended PSI submitted to the court. Nichols, through defense counsel Saperstein, admitted to his persistent drug problems in the sentencing memorandum submitted to the court, and during his final statements to the court. At bottom, Nichols fails to point to any statements made by the prosecutor at sentencing that came directly and only from "statements [he made] in court or to treatment providers." The circuit court reviewed the prosecutor's sentencing arguments and found that the prosecutor did not violate the terms of the drug court contract that Nichols alleges were violated, and we agree. For the above reasons, we reject this argument.

¶35 Turning to Nichols' arguments regarding the circuit court, Nichols claims that the PSI detailed Nichols' drug treatment and his failures in the drug treatment program and that the court improperly considered and relied on these treatment records and statements that Nichols made in drug court when sentencing Nichols. Nichols frames his arguments in the context of a breach of a plea agreement by the prosecutor and the court, with the result that the sentences imposed for the felony bail jumping and failure to report to jail charges should be vacated and remanded for resentencing before a different court.

¶36 In its oral ruling on Nichols postconviction motion, the circuit court reframed the issue as whether the court relied on an improper factor when sentencing Nichols. We agree that this is the proper legal framework to analyze Nichols' arguments on this topic.

¶37 A defendant has a constitutional due process right not to be sentenced based on an improper factor. *State v. Alexander*, 2015 WI 6, ¶23, 360 Wis. 2d 292, 858 N.W.2d 662. Our Wisconsin Supreme Court in *Alexander* summarized the applicable legal framework to determine whether a circuit court erroneously relied on an improper factor. "A circuit court erroneously exercises its sentencing discretion when it actually relies on clearly irrelevant or improper factors. A defendant bears the burden of proving, by clear and convincing evidence that the sentencing court actually relied on irrelevant or improper factors." *Id.*, ¶17 (quotations and quoted source omitted). A defendant who asserts that the circuit court erred by relying on an improper factor at sentencing must show that: (1) the information was improper; and (2) that the court relied on that improper factor when sentencing the defendant. *Id.*, ¶18. Assuming without deciding that the statements Nichols made to the treatment providers and to the court are improper factors for sentencing purposes, we conclude that Nichols has not carried his requisite burden of proving that the court relied on improper factors when sentencing Nichols.

¶38 At the postconviction motion hearing, the circuit court stated that it had reviewed its remarks and analysis at the 2012 sentencing hearing at least twice, and that based on its review, the court concluded that it had not relied on an improper factor "or anything from drug court" when sentencing Nichols. We agree.

¶39 We have reviewed the circuit court's statements and analysis supporting its sentencing decisions at the sentencing hearing. Our review reveals that the court correctly relied on the three primary factors a court must consider in arriving at a sentence—the gravity of the offenses, Nichols' character including his criminal history and his rehabilitative needs, and the need to protect the public. *See State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The court also considered Nichols' age, education, the extent of his alcohol and drug dependency, Nichols' criminal history, the read-in offenses, whether Nichols was remorseful and repentant, and the extent to which Nichols cooperated during the criminal court proceedings. Nichols does not argue that these were improper factors for the court to consider when sentencing Nichols.

¶40 To the extent that the sentencing court considered information regarding Nichols' experiences in drug court, we are satisfied that the court did not improperly rely on information prohibited by the drug court contract. By way of example, the court noted at the sentencing hearing that Nichols failed to comply with a drug court requirement that he make preparations for a sobriety, a device that measures whether a person is under the influence of an intoxicant or drugs. The court inferred from this fact that, contrary to Nichols' assertions to the PSI writer that he had refrained from using alcohol or drugs since 2009, Nichols had been using these substances, and his use served as part of the reason for why Nichols failed to appear in court in June 2009 for sentencing on the heroin charge. In addition, Nichols does not dispute that the court reviewed the criminal complaints at issue, the PSI, and Nichols' mother's independent letter and sentencing memorandum, sources from which the court acquired information about Nichols' drug court experiences.

¶41 Another problem with Nichols claim that the circuit court relied on an improper factor when sentencing Nichols is that Nichols does not point to any specific statements or remarks that the court made at the sentencing hearing that indicate consideration of improper factors. Rather, Nichols quotes from part of the sentencing hearing transcript, and in conclusory fashion, argues that his due process rights were violated because the court relied on information from Nichols' drug court treatment records, and therefore, he is entitled to a new sentencing hearing to be heard by a different judge and argued by a different prosecutor.

¶42 To the extent that Nichols develops an argument regarding the circuit court's reliance on improper factors in rendering its sentence, Nichols relies on *Santobello v. New York*, 404 U.S. 257 (1971). Nichols' reliance on *Santobello* is misplaced. The issue presented to the United States Supreme Court in *Santobello* concerned allegations that the prosecutor violated the terms of the plea agreement. *Id.* at 262. While the issue in this case is perhaps a species of a violation of a plea agreement, Wisconsin case law directly speaks to the narrow issue before us—whether the circuit court rely on improper factors in sentencing Nichols. Thus, the resolution of this case is governed by Wisconsin case law addressing this narrow topic.

¶43 In sum, based on the foregoing reasons, we conclude that Nichols has not demonstrated that he is entitled to withdraw his guilty plea to the possession of heroin charge and that he has also not demonstrated that he is entitled to resentencing on any of the charges at issue in this case. Accordingly, we affirm.

By the Court.—Judgments and order affirmed.

This opinion will not be published pursuant to WIS. STAT. RULE
809.23(1)(b)5. (2015-16).

